COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3113

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

AMEREQUIP CORPORATION -- NEW HOLSTEIN, AND THE CONNECTICUT INDEMNITY COMPANY,

PLAINTIFFS-RESPONDENTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

THOMAS PATEK,

DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Reversed and cause remanded with directions.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. The Labor and Industry Review Commission (LIRC) has appealed from a circuit court order reversing its decision awarding

worker's compensation benefits to Thomas Patek. We reverse the circuit court's order and remand the matter with directions to reinstate LIRC's order.

¶2 In making its award, LIRC determined that Patek sustained an accidental injury in the course of his employment with Amerequip Corporation-New Holtstein and ordered Amerequip and its worker's compensation insurer, The Connecticut Indemnity Company, to pay temporary disability benefits to him. LIRC made the award pursuant to § 102.03(1), STATS., which provides, in material part, that an employer is liable for worker's compensation benefits:

> (a) Where the employe sustains an injury.
>
> ....
>
> (c) 1. Where, at the time of the injury, the employe is performing service growing out of and incidental to his or her employment.
>
> ....
>
> (d) Where the injury is not intentionally self-inflicted.
>
> (e) Where the accident or disease causing injury arises out of the employe's employment.

¶3 In determining that liability existed under this statute, LIRC found that Patek injured his hand when he punched a metal locker at Amerequip on April 13, 1995. LIRC found that Patek was finishing his shift at the time and that earlier in the shift Patek had requested that a supervisor come and inspect his work. After the request, Patek heard a voice come over the loudspeaker, mocking his voice and repeating the words he had used in his request. LIRC found that Patek ignored the conduct at the time. It also found that while getting ready to leave after finishing his shift, Patek heard the same voice over the loudspeaker and observed his supervisor looking at him and laughing. LIRC found that after

observing the supervisor and concluding that the voice which was mocking him belonged to her husband, Patek punched the locker out of anger and frustration.

¶4 In holding Amerequip liable, LIRC found that Patek was subjected to harassment which was part of his work environment and that his response to it was not so unreasonable or unexpected as to take his action outside the course of his employment. LIRC determined that to the extent Patek's action constituted a deviation from his employment, it was an impulsive and momentary deviation from his normal duties. Based on the evidence, it also found that Patek's action in striking the locker was a momentary, angry reaction to being mocked and was not done with the intent to injure himself so as to preclude coverage under § 102.03(1)(d), STATS. LIRC concluded that Patek's injury occurred while performing services arising out of and in the course of his employment and that the injury was therefore compensable.

¶5 On review of a circuit court order reversing an order of LIRC, this court's scope of review is the same as that of the circuit court. *See* ***L & H Wrecking Co. v. LIRC***, 114 Wis.2d 504, 508, 339 N.W.2d 344, 346 (Ct. App. 1983). This court must affirm findings of LIRC if there is any credible evidence in the record to support those findings, even if they are against the great weight and clear preponderance of the evidence. *See* ***id.*** at 508, 339 N.W.2d at 346-47. In reviewing the sufficiency of the evidence, this court need only determine that the evidence is sufficient to exclude speculation or conjecture. *See* ***id.*** at 508, 339 N.W.2d at 346. The credibility of the witnesses and the persuasiveness of the testimony are for the agency to determine. *See* ***id.*** at 509, 339 N.W.2d at 347.

¶6 While not disputing that LIRC's findings regarding the circumstances surrounding Patek's injury are findings of fact, Amerequip contends

that LIRC's application of § 102.03(1), STATS., to those facts presents a question of law which this court may review de novo. We disagree. Even when the facts are undisputed in a worker's compensation case, if different inferences can reasonably be drawn from the evidentiary facts, the drawing of such inferences by LIRC gives rise to a finding of fact, not a conclusion of law. *See* ***Sauerwein v. DILHR***, 82 Wis.2d 294, 299-300, 262 N.W.2d 126, 129-30 (1978). In addition, it is well established that LIRC has developed significant expertise in determining when an employee is acting within the scope of his or her employment and that its decisions in such matters must be given weight and deference. *See* ***Nigbor v. DILHR***, 120 Wis.2d 375, 384, 355 N.W.2d 532, 537 (1984). We will defer to LIRC's conclusions if they are reasonable, even if this court would not have reached the same conclusions. *See* ***id.***[1]

¶7 LIRC's conclusion that Patek's injury occurred while performing services arising out of and in the course of his employment is reasonable and cannot be disturbed. As found by LIRC, Patek was still punched in at work at the time he heard the mocking voice over the loudspeaker and observed his supervisor's reaction. Its findings that Patek was subjected to harassment and that the harassment was part of his work environment are supported by credible evidence in the record. Based upon its findings regarding harassment, it could reasonably conclude that Patek's act of punching the locker in anger and frustration arose out of his employment.

[1] To the extent Amerequip is arguing that we should apply a de novo review because this case presents an issue of first impression, we reject its argument. We will not ignore LIRC's experience and expertise in determining scope of employment issues merely because there are no reported cases applying worker's compensation statutes to the specific facts present here. *See* ***Bretl v. LIRC***, 204 Wis.2d 93, 105, 553 N.W.2d 550, 554 (Ct. App. 1996).

¶8 Amerequip contends that the breaking of Patek's hand was a foreseeable and natural consequence of striking the locker and that liability is therefore prohibited under § 102.03(1)(d), STATS. However, § 102.03(1)(d) precludes liability only when an injury is intentionally self-inflicted. While it is undisputed that Patek intentionally struck the locker, LIRC found that the evidence did not support a determination that he intended to injure himself. Because LIRC's finding that Patek lacked intent to injure himself is supported by the evidence, it must be upheld by this court.[2] Moreover, if the result of an act is unexpected and unforeseen by the person injured, then the injury is accidental. *See* ***School Dist. No. 1 v. DILHR***, 62 Wis.2d 370, 375, 215 N.W.2d 373, 376 (1974); ***John H. Kaiser Lumber Co. v. Industrial Comm'n***, 181 Wis. 513, 515, 195 N.W. 329, 330 (1923). Because the injury was not foreseen and expected by Patek, LIRC properly rejected Amerequip's claim that it was not accidental under § 102.03(1)(e).

¶9 Amerequip also contends that Patek's act of intentionally hitting the locker constituted a deviation from his employment such that he was not performing services growing out of and incidental to his employment within the meaning of § 102.03(1)(c), STATS. However, a deviation which is impulsive, momentary and insubstantial does not remove an employee from the course of his or her employment. *See* ***Maahs v. Industrial Comm'n***, 25 Wis.2d 240, 244-45,

[2] In contending that liability is precluded because Patek intentionally struck the locker, Amerequip also relies on two cases from other jurisdictions, ***Glodo v. Industrial Commission***, 955 P.2d 15 (Ariz. Ct. App. 1997), and ***McKay Dee Hospital v. Industrial Commission***, 598 P.2d 375 (Utah 1979). As acknowledged in ***Glodo***, 955 P.2d at 19, the reasoning underlying those cases has been criticized in 2 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 36.62, at 6-200 (1997). Most importantly, because this case deals with the provisions of Wisconsin's worker's compensation laws, and not with the varying worker's compensation statutes of other states, the reference to out-of-state authority is not persuasive. *See* ***Larson v. DILHR***, 76 Wis.2d 595, 622, 252 N.W.2d 33, 46 (1977).

130 N.W.2d 845, 848 (1964). The extent and seriousness of a deviation are judged not by its consequences, but by the nature and the seriousness of the deviation itself. *See* ***Nigbor***, 120 Wis.2d at 386, 355 N.W.2d at 538. In evaluating the completeness of the deviation, the extent of the work interruption must be considered. *See* ***id.***

¶10 LIRC found that Patek's actions constituted an impulsive and momentary deviation from his normal duties and that his reaction, although regrettable, was not unusual or unexpected in light of the harassment which he suffered as part of his work environment. LIRC's determination is reasonable and supported by the evidence indicating that Patek's act was a fleeting, angry reaction, constituting only a slight deviation from his normal duties of cleaning up and getting ready to leave at the end of his shift. Moreover, while the consequences to Patek's hand were serious, LIRC could reasonably conclude that the act of striking the locker itself was not so serious and substantial as to remove him from the course of his employment. LIRC's award therefore must be reinstated.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.